

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-3185

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

**IN RE THE TERMINATION OF PARENTAL RIGHTS OF
AARON J.H., A PERSON UNDER THE AGE OF 18:**

KEVIN B.,

PETITIONER-RESPONDENT,

V.

MICHAEL W.E.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Oconto County:
LARRY L. JESKE, Judge. *Affirmed.*

MYSE, J. Michael W. E. appeals an order terminating his parental rights and an order denying post-judgment relief. Michael argues that there is no credible evidence to support the jury's finding that he failed to demonstrate substantial progress toward meeting the conditions established for the return of his son and that the trial court erred both by failing to find that his

conduct was so egregious as to warrant a finding of unfitness and by denying his ineffective assistance of counsel claim. Because this court concludes that the jury finding is supported by credible evidence, that the trial court did make the required finding of unfitness, and that any deficiency of counsel did not prejudice the outcome of the trial, the order is affirmed.

Aaron J. H., Michael's son, was born five years ago and has spent his whole life in a foster home. Michael has a history of mental illness, and his IQ places him in the mildly retarded level. Michael never completed high school and is not employed. The diagnosis of Michael's mental illness is uncertain, and has been changed from schizophrenia with an unspecified personality disorder to depression. Michael undergoes therapy and treatment for his disorder, but has missed appointments and does not regularly take his medication.

When Aaron was about two years old, the court established the following conditions for Michael in order to obtain custody of his son:

Michael [E.] shall sign a release for information on different counseling and hospital facilities that he has been involved with.

Michael [E.] shall continue with current psychiatric care.

Michael [E.] shall successfully participate in parenting and independent living classes.

Michael [E.] shall participate in counseling for anger management.

Michael [E.] shall be able to demonstrate an ability to care for himself in his own living environment before being considered as a custodial parent.

Michael [E.] shall refrain from criminal conduct.

About three years after establishing these conditions, Kevin B. petitioned the court to terminate Michael's parental rights to Aaron.¹ A jury found that Michael failed to demonstrate substantial progress toward meeting these conditions, and the court entered judgment terminating Michael's parental rights. Michael then brought several post-judgment motions, which were denied. Michael appeals.

Michael's first argument is that there is no credible evidence to support the jury's finding that he failed to demonstrate substantial progress toward meeting the established conditions. The standard of review of such a jury finding is highly deferential, for this court must examine the record for any credible evidence to sustain the finding. *Fehring v. Republic Ins. Co.*, 118 Wis.2d 299, 306, 347 N.W.2d 595, 598 (1984), *overruled on other grounds by DeChant v. Monarch*, 200 Wis.2d 559, 547 N.W.2d 592 (1996).

The record demonstrates that there is little merit to this argument. The jury heard evidence that Michael did not always make his psychiatric care appointments and that he was not fully complying with his treatment plan. Michael himself testified that he took his medication only when he wanted to, and not when he was directed. Further, there was evidence that Michael had once been evicted from an apartment and that there were times his apartment was sufficiently unclean as to give off a "stench." This is sufficient evidence to permit a jury to find that Michael did not make substantial progress toward meeting the requirements that he continue his current psychiatric care and demonstrate an ability to care for himself.

¹ The parental rights of Aaron's mother, now Michael's wife, were also terminated, but that judgment is not a part of this appeal.

Michael's next argument is that the trial court erred by not determining whether the evidence presented at trial was so egregious as to require termination of his parental rights. Even if the jury finds that grounds for termination exist, the court may still dismiss the petition if "the evidence of unfitness is not so egregious as to warrant termination of parental rights." *In re K.D.J.*, 163 Wis.2d 90, 103, 470 N.W.2d 914, 920 (1991). This discretionary decision of the trial court preserves the constitutionality of termination proceedings. *Id.* at 92-93, 470 N.W.2d at 915. The court should evaluate "the quantity, quality, and persuasiveness of the evidence" in making its discretionary decision to terminate. *Id.* at 104, 470 N.W.2d at 920.

A trial court, however, need not specifically make an express finding of parental unfitness before terminating parental rights if the trial court's comments demonstrate that it was convinced the parent's unfitness was sufficiently egregious to warrant termination. *Id.* at 103, 470 N.W.2d at 920. We conclude that here, as in *K.D.J.*, the court made "unmistakable but implicit findings," and that it is unnecessary to remand for a specific declaration to that effect. *Id.* at 109, 470 N.W.2d at 922. In rendering judgment, the trial court stated, "Neither [Michael nor his wife] in my view has the mental capacity to properly care for Aaron. The parents can't take care of themselves much less take care of a child." Elsewhere, the court stated, "I just don't think Michael really knows how to take care of a child." Implicit in these comments is the finding that Michael's unfitness is sufficiently egregious to warrant termination.

Michael's final argument is that he was denied the effective assistance of counsel required in termination proceedings. See *In re M.D.(S)*, 168 Wis.2d 995, 1005, 485 N.W.2d 52, 55 (1992). Michael argues that his trial counsel erroneously allowed the jury to hear argument and evidence that the

termination of Michael's parental rights was in Aaron's best interests, an issue not before it. Michael argues that this evidence prejudiced his case because it permitted the jury to answer the special verdict questions in favor of the petitioner simply because the jury was convinced that Aaron should be adopted by more capable parents.

Wisconsin follows a two-part test in reviewing claims of ineffective assistance of counsel. First, counsel's performance must be deficient. *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). Second, there must be a showing that any deficiencies were so prejudicial as to deprive the client of a fair trial, a trial whose result is reliable. *Id.* at 127, 449 N.W.2d at 848. A reviewing court may avoid the deficient performance analysis altogether if the defendant has failed to show prejudice. *Id.* at 128, 449 N.W.2d at 848.

This court cannot conclude that any of the alleged deficiencies “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). First, Michael's attorney warned the jury during his closing argument that their role was not to consider Aaron's best interests:

[T]he real problem, though, that bothers me is you are going to look at my client and at his wife and you are going to say – and I even hate to mention it because it's going to affect your decision – but you are going to say where is this five-year-old-boy better off, in an adoptive home or with these people who have all these problems, and that really isn't the question though and that's what you are going to have to guard against

Second, the jury was provided with special verdict questions, and warned by the trial court to “not concern [themselves] about whether [their]

answers will be favorable to one party or the other, nor with what the final result of this lawsuit will be.” The effect of special verdict questions with this instruction helped focus the jury’s attention on the issues properly before it. Further, there was abundant evidence supporting the jury’s verdict that Michael had not met at least two of the conditions set for the return of his son. In considering all these factors, this court concludes that any deficiency by trial counsel did not prevent Michael from having a fair trial.

By the Court.—Orders affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

